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No. 88-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

We showed in the petition that the decision below (like the decision in the related case of *Wells Fargo*) raises an issue of great importance to the federal regulation of U.S. banks, the federal safety net constructed to protect the domestic banking system, and the stability and efficiency of international banking operations. Respondent makes no effort to refute these representations. He does not deny that the ruling of the court of appeals, if generally applied, would destroy the longstanding distinction between the domestic U.S. banking system and foreign operations of U.S. banks, which has formed the foundation for federal government regulation of foreign operations of U.S. banks since the founding of the federal reserve system. Nor does he try to reconcile the conflicting approaches and results reached by various state and lower federal courts in dealing with the issue presented here.

Rather, respondent urges the Court to deny certiorari by arguing that the precise formulation of the issue pre-

sented here was not raised below, that this is not an appropriate case for application of federal law, that the Sixth Circuit decision has precedent in a 1924 decision of the New York Court of Appeals, and that any problem created by the decision below could easily be corrected by contract. None of these points has any merit.

1. Respondent's principal argument against the grant of certiorari is that there was no claim of the primacy of federal law in the courts below. Br. in Opp. at 7-8. But both Citibank and the United States government attempted to persuade the court of appeals through a variety of means to accept one central proposition: that whatever rule of liability the court adopted in this case, it must be consistent with federal law and policy. These submissions placed the court of appeals on notice that a federal claim was at issue and afforded full opportunity to consider the paramount federal interests at stake here.

In its brief in the court of appeals, Citibank argued that "under U.S. law, Citibank is not liable for deposits at its expropriated Saigon branch." Brief of Citibank on Appeal at 29, *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988) (No. 86-1258).[1] In support of that argument, Citibank pointed to a number of respects in which "U.S. banking laws . . . recognize the separation . . . between a foreign branch and the bank's head office," (*id.* at 31), including the federal banking law provisions exempting foreign branch deposits from U.S. reserve requirements and from Federal Deposit Insurance Corporation insurance assessments and provisions requiring that separate accounts be maintained for foreign branch operations of U.S. banks. And in criticizing the *Vishipco* decision, Citibank explained that a rule of home office liability would (a) "disturb the domestic legal

[1] To be sure, Citibank also argued that it was not liable based on the contract and that it was not liable under Vietnamese law. Such arguments were made because in Citibank's view, proper interpretation of the contract and application of Vietnamese law would have resulted in a ruling that did *not* contradict federal banking law and policy.

and policy framework for international banking," (b) cause U.S. banks "to reduce or eliminate their foreign operations, thus adversely affecting U.S. foreign trade," (c) "adversely affect international banking markets and the role U.S. banks can play in facilitating flows of finance and credit," and (d) "discourage, in emergency conditions, responsible corporate actions abroad in cooperation with U.S. government authorities" (*id.* at 45-46).[2]

For its part, the U.S. government urged that the district court's decision holding Citibank liable contradicted important federal policies reflected in federal standards. In its *amicus* brief, the government explained that the "'springing debt' theory in this case is contrary to the interests of the United States" because it "could impair the financial condition of [American] banks" and "[i]n an extreme case, . . . could also affect the credit and insurance facilities of the federal government." Brief for the United States as Amicus Curiae at 3, 23, *Trinh*, *supra* (footnote omitted). In addition, the government argued that the approach taken by the district court (and later adopted by the court of appeals) was inconsistent with that of federal bank regulators and would "make it substantially more difficult for U.S. bank regulatory agencies to estimate the risk to liquidity posed by the operation of foreign branches. When supervising banks with foreign branches, bank regulators have acted on the general understanding that foreign branches will not be required to honor deposit contracts payable in local currency when the assets of the branch have been confiscated by local authorities." *Id.* at 24-25. Finally, the government expressed concern that holding Citibank liable in these circumstances would deter U.S. banks "from establishing foreign branches" and thereby con-

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[2] Citibank also relied on the federal common law doctrine of Act of State, arguing that it was not liable under Act-of-State principles and that the imposition of liability would be inconsistent with the rulings of the Foreign Claims Settlement Commission (Brief of Citibank on Appeal at 35-41, *Trinh*, *supra*).

tradict the "fundamental purpose of the law permitting U.S. banks to establish branches abroad." *Id.* at 25.

Following issuance of the panel's opinion, Citibank and the United States renewed their arguments that holding Citibank liable was inconsistent with federal law and policy. In its Petition for Rehearing, Citibank argued that the panel's decision "overlooked federal law and policy when it imposed head office liability" (Reh. Pet. at 9) and "contradicts federal banking law and policy established by the United States Government . . . which was outlined in the *amicus* brief for the United States" (*id.* at 11-12). Similarly, the United States, in its Statement as Amicus Curiae in support of Citibank's rehearing petition, stated that "the decision of the panel majority is wrong" and that the government "continue[s] to adhere to the arguments set forth in [its previous] brief." *Id.*

In the face of these submissions, there is no merit to respondent's assertion that Citibank did not adequately present its federal law claim to the court of appeals. To be sure, Citibank's position in the court of appeals did not use the literal term "preemption" or "federal common law," but rather spoke of conflict and the need to have federal law and policy prevail. Even if this choice of words was read to recast the argument, this Court has repeatedly held that a litigant may refocus its federal claim in a certiorari petition by recasting the argument it made below. Thus, " '[p]arties are not confined here to the same arguments which were advanced in the courts below' " and may present any claim that is " 'only an enlargement' " of that previously raised or that is " 'so connected with [the issues below] in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment.' " [3]

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[3] *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)). *See Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954) (an issue may be raised in the Supreme Court,

In the present case, Citibank and the U.S. government plainly urged below that any rule of state or foreign law that imposed home office liability would be "in conflict with the policy of the United States," citing the very same statutes and regulations in support of their position that Citibank now relies upon in its petition. The Sixth Circuit held against Citibank not because it was unaware of the applicable federal law and policy, but because it believed that those considerations were insufficient to justify a different result. The court of appeals' decision thus constitutes a square rejection of the federal law arguments made by Citibank and the United States. Nothing in principles of sound judicial administration or fairness to the lower court suggests that that decision should be insulated from Supreme Court review.[4]

2. Respondent also argues that this case does not warrant application of federal law because the federal interests involved are too "speculative" and "remote." Br.

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even though the issue was "inexplicit" in the court below, so long as it was "within the clear intendment of" the argument that was presented in the lower court); *Youakim v. Miller*, 425 U.S. 231, 234-35 (1976) (petition permitted to press supremacy clause claim despite having raised only an equal protection claim below because the issue was "not foreign to the subject matter" of what had been litigated); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (Court reviewed a takings clause claim on the basis of due process arguments made below); *Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n.10, 678-80 (1969) (Court addressed the issue of federal preemption of the estoppel doctrine in patent litigation even though the appellant had sought only an "exception" to the doctrine in the lower court).

[4] We also note that the Supreme Court, in reviewing a federal court judgment, has jurisdiction to pass upon an issue that was not raised below. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure (Jurisdiction)* § 4036, at 35 (2d ed. 1988). The prudential rule that issues should be raised below "is not inflexible" (*Youakim v. Miller*, 425 U.S. at 234), and the Court has discretion to grant review of new issues in appropriate circumstances. Given the serious adverse consequences that would result from the court of appeals' decision in this case, review would be warranted here even if the issue had not been raised in the lower court.

in Opp. at 8. In so contending, respondent ignores the actions of Congress and federal bank regulators pursuant to their constitutional powers that have given concrete expression to the substantial federal interests at stake here.[5] Nor does petitioner even acknowledge the fact that, because this case centers upon the foreign commerce and foreign relations of the United States, it arises in an area constitutionally committed to federal control.[6] But perhaps the best illustration of the powerful federal interests in this case is found in the *amicus* brief of the United States government in the court of appeals, which explained that holding Citibank liable here would run contrary to U.S. interests in (1) preserving the basis for some 75 years of extensive regulation of foreign branches of U.S. banks by Congress, the Federal Reserve Board, and the Federal Deposit Insurance Corporation;[7] (2) protecting the U.S. banking system and federal safety net from "unwarranted and unforeseeable strains;"[8] (3) promoting the foreign commerce of the United States through an extensive system of foreign branches of U.S. banks;[9] and (4) furthering U.S. for-

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[5] *See, e.g.*, 12 U.S.C. § 461(b)(6) (1982) (App. at 62a-63a) (foreign branch deposits exempted from reserve requirements); 12 U.S.C. § 1813(*l*)(5)(A) (1982) (App. at 64a-65a) (foreign branch deposits exempted from ~~FDIC~~ insurance assessments).

[6] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 451-56 (1979); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964); *United States v. Pink*, 315 U.S. 203, 233-34 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904); *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 482 (1888).

[7] Brief for the United States as Amicus Curiae at 24 & n.*, *Trinh*, *supra* (decisions such as that here "make it substantially more difficult" for U.S. regulators because such decisions are contrary to the regulators' "general understanding" and "d[o] not comport with [the banks'] treatment by federal banking regulators").

[8] *Id.* at 33.

[9] *Id.* at 25 (decisions such as that of the court of appeals here are contrary to "a fundamental purpose of the law permitting

eign relations interests, including its policies with respect to withdrawal of U.S. citizens from territory being invaded by hostile forces, discouraging foreign government expropriation in the absence of prompt, adequate, and effective compensation, and avoiding the issuance by U.S. courts of decisions contradicting international claims commissions established by the United States.[10]

In light of these powerful indications of overriding federal concern and interest, it is difficult to take seriously petitioner's assertion that the federal involvement in this case is "remote" or "speculative." Certainly this case is wholly different from those cited by respondent, such as *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where the U.S. interest—although real—was merely in the nature of the regulation of essentially private conduct. Indeed, the extensive statutes and regulations involved here, and the direct effect upon federal regulators, make this case a far stronger one for application of federal law than was presented to this Court recently in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988). In these circumstances, federal law should be applied to determine the extent of U.S. banks' liability in cases such as this, recognizing that state (or foreign) law would be superseded only to the extent that such law conflicted with federal law and policy.[11]

3. Respondent further suggests that the decision below is simply the latest in a long line of cases dating back to 1924 reaching a similar result. Br. in Opp. at 11-12. That is not true. Until quite recently the prevailing law

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U.S. banks to establish branches abroad," which is "to further the foreign commerce of the United States").

[10] *Id.* at 29-30.

[11] *See Boyle v. United Technologies Corp.*, 108 S. Ct. at 2516; *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973); *Howard v. Lyons*, 360 U.S. 593, 597 (1959). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

was to the contrary of that set forth by the court of appeals.

It is true, to be sure, that in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), the New York Court of Appeals held a U.S. bank liable for deposits held with its Russian branch after the Soviet takeover in 1917. In *Sokoloff*, however, the actual deposit had been made in dollars in New York, with instructions to credit an account in rubles in Petrograd, and federal and state courts shortly after *Sokoloff* limited that decision to its facts, ruling that U.S. financial institutions would *not* be liable for Russian deposits where the deposits themselves had been made in Russia.[12]

The New York State legislature also attempted to change the effect of *Sokoloff*. In 1937, New York enacted a statute making a New York bank liable for deposits payable at its foreign branch only to the extent that local banks in the host country would similarly be liable for losses arising from the host country's actions or laws.[13] In 1941, this statute was supplemented by the addition of a provision proportionately reducing the liability of any New York bank for the obligations of its foreign branch to the extent that a government not recognized by the U.S. government confiscates branch assets.[14] After *Vishipco*,[15] the statute was again revised to make explicit

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[12] *See Trinh v. Citibank, N.A.*, 850 F.2d at 1178 (Brown, J., dissenting) (App. at 31a); *Tillman v. National City Bank*, 118 F.2d 631 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (Sup. Ct. 1935). *Accord Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689, 273 N.Y.S.2d 700 (Sup. Ct. 1966), *aff'd without opinion*, 29 A.D.2d 847, 289 N.Y.S.2d 389, *cert. denied*, 393 U.S. 982 (1968).

[13] N.Y. Banking Law § 138(1) (McKinney 1971 & Supp. 1989).

[14] N.Y. Banking Law § 138(2) (McKinney 1971 & Supp. 1989).

[15] *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

its application to national banks headquartered in New York.[16]

In truth, therefore, it was after 1981 that a new rule of liability for foreign branch deposits began to harden. In 1981, the Second Circuit issued its surprising decision in *Vishipco* based on no real authority other than a law review article introducing the so-called "spring and cling" doctrine into U.S. jurisprudence. Since that time, there have been five additional decisions (three within the last year) dealing with the issue of U.S. banks' liability for foreign branch deposits. In two of these (including the present case), courts followed the lead of *Vishipco* and held U.S. banks liable based on a presumption of home office liability.[17] Another decision held the U.S. bank liable based on what the courts (wrongly) found to be an explicit agreement by the U.S. bank to assume such liability.[18] In a fourth case, the court of appeals remanded the case for determination whether the U.S. bank entered into such an agreement.[19] Finally, one court (the New York Court of Appeals) held that the U.S. bank would not be held liable for foreign branch deposits when a foreign sovereign had seized the foreign branch.[20] In such circumstances, respondent's suggestion that "uniformity [is] already present under the *Sokoloff* line of cases" (Br. in Opp. at 11) cannot be given credence.

4. Finally, respondent asserts that "a simple waiver" inserted in deposit contracts would solve whatever prob-

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[16] 1984 N.Y. Laws ch. 689, § 1 (codified as amended at N.Y. Banking Law § 138 (McKinney Supp. 1989)).

[17] *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984).

[18] *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), *petition for cert. pending*, No. 88-1260 (U.S. filed Jan. 25, 1989).

[19] *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988).

[20] *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984).

lems are caused by the decision below. Br. in Opp. at 14. In so asserting, respondent does not deal with Citibank's explanation (Pet. for Cert. at 19-20) of why such "simple waivers" cannot work.[21] For example, he does not suggest how his waiver could be inserted retroactively into agreements covering more than $200 billion in foreign branch deposits already outstanding. And it remains the fact that, as described in the petition in *Wells Fargo*, thousands of international banking transactions are conducted each day in an oral market that does not permit insertion of even "simple waivers."

Nor does respondent attempt to explain why U.S. courts would honor his "simple waiver" when they have failed to enforce other better-drafted attempts to limit home office liability. Thus, for example, in this very case the court of appeals undertook a tortured re-writing of a standard *force majeure* clause in Citibank/Saigon's deposit agreement. So long as U.S. courts look—as the court of appeals did here—solely to the unilateral expectations of depositors (whether theoretical or real), rather than to the federal requirements of the banking system, there is strong reason to doubt that *any* contractual provision will be construed to relieve U.S. banks from liability when foreign sovereigns seize or freeze the assets of the bank's foreign branches—a fact candidly acknowledged by the Second Circuit in *Vishipco*.[22]

CONCLUSION

The petition for writ of certiorari should be granted.

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[21] Respondent's suggested waiver is nevertheless instructive as to why no waiver could be "simple" and take care of the problems raised here. For example, respondent's simple waiver would not have applied in the present case for at least three independent reasons: (1) it was not Mr. Trinh's government (but rather Communist forces) who seized the Citibank branch; (2) Mr. Trinh held no assets in the Citibank branch (but rather was owed money by the branch); and (3) according to the "spring and cling" doctrine adopted by the court below, Mr. Trinh's "assets" left Vietnam with the last Citibank employees and thus were not "expropriated."

[22] 660 F.2d at 863-64.

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